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IN THE

Supreme Court of the United States

KAISER EAGLE MOUNTAIN, INC., *et al*
Petitioners,

v.

NATIONAL PARKS & CONSERVATION ASSOCIATION, *et al*.
Respondents.

On Petition For A Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF COACHELLA VALLEY ECONOMIC PARTNERSHIP AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS

The Coachella Valley Economic Partnership ("CVEP") moves this Court for leave to file an amicus curiae brief in support of Petitioners, Kaiser Eagle Mountain, Inc. and Mine Reclamation Corporation (collectively "Kaiser"). This Motion and the proposed Amicus Brief below are filed within 30 days of the time this case was placed on the Court's docket. Counsel of record for each party was given notice of CVEP's intent to file an amicus brief at least 10 days prior to the date on which this Amicus Brief was filed. Petitioner has consented to the filing of this Brief, and a letter of consent has been filed with the Clerk of this Court. The Solicitor General's Office, on behalf of the Bureau of Land Management and United States Department of Interior has also consented to the filing of this Brief. Written consent has been filed with the Clerk of this Court. Counsel for the National Parks & Conservation Association has also consented, and written consent has been filed with the Clerk of this Court. Counsel for Donna Charpied, Laurence Charpied, and the Desert Protection Society and Center for Community Action and Environmental Justice did not respond to CVEP's request for consent.

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INTEREST OF AMICUS CURIAE

CVEP[1] is a regional economic development organization devoted to improving both the economy and quality of life in the Coachella Valley. The Coachella Valley is located in southeastern Riverside County, California, and is bounded by the San Jacinto, Santa Rosa, and Little San Bernardino Mountains. The area, west of the Kaiser project site, is known for its natural beauty, and as one of the world's top resort communities.

CVEP is comprised of both private and government partners dedicated to studying and implementing local strategic initiatives that spur sustainable economic growth. CVEP's government partners come from each of the nine incorporated cities comprising the Coachella Valley: Palm Springs; Desert Hot Springs; Rancho Mirage; Cathedral City; Indio; La Quinta; Palm Desert; Indian Wells; and Coachella. CVEP has numerous other government partners, including but not limited to, the Agua Caliente Band of Cahuilla Indians, the Cabazon Band of Mission Indians, the Torres Martinez Desert Cahuilla Indians, the County of Riverside, the Riverside County Economic Development Agency, the Coachella Valley Association of Governments, and the Palm Springs Desert Resort Communities Convention and Visitors Authority, Imperial Irrigation District, Coachella Valley Water District, and Sunline Transit Agency. CVEP's private partners come from a cross-section of regional

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[1] No counsel for a party authored the proposed Amicus Brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this Brief.

industries, including representatives from Desert Regional Medical Center, Southern California Edison, Rabobank, the Desert Sun newspaper, Pacific Western Bank, and many other organizations.[2]

The Kaiser Petition addresses generally the amount and type of judicial scrutiny appropriate for an administrative decision, but the particular issues raised by the underlying case have a far-reaching impact on our regional community and on the potential for its current and future development. Federal lands comprise the bulk of the magnificent desert areas of eastern Riverside County, but local involvement with conservation efforts and responsible development is a key factor in preserving both the character and long-term integrity of living systems and dramatic landscapes in the region. This case is important to our region and partners.

ARGUMENT

I. The Decision Below Allows The Ninth Circuit To Substitute Its Own Judgment For Agency Review Informed By Local Concerns

In its published decision below, the Ninth Circuit found fault with the Statement of Purpose and Need adopted by the Bureau of Land Management ("BLM") supporting the proposed land exchange between Kaiser and the United States. 606 F.3d 1058, 1070-71. Specifically, the court found the

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[2] The above-named are CVEP partners and their inclusion in this Amicus Brief should not imply their independent support of its contents.

BLM too narrowly defined its Statement of Purpose and Need, taking into account Kaiser's needs more than those of the BLM. *Id.*

But, the opinion below focuses too narrowly on the summary paragraph in the Statement of Purpose and Need, essentially deeming irrelevant the significant environmental benefits accounted for by the BLM in its extensive environmental analysis of the project. *See* 606 F.3d 1058, 1078-79, 1083, 1089-91. Among other things, the land exchange would have allowed the BLM to acquire from Kaiser important habitat areas already recommended for acquisition under the California Desert Conservation Area ("CDCA") Plan. *Id.* at 1082. That is, the land exchange would have permitted conservation of important habitat for several endangered species, and would have allowed that habitat to become part of very large area of desert land already protected from development.

Further, the Kaiser project was originally intended to provide a major source of funding for the Coachella Valley Multiple Species Habitat Conservation Plan ("MSHCP"). The MSCHP was the result of a decade-long joint planning process among local, state, and federal agencies responsible for regulating development and protecting habitat in the Coachella Valley. The plan is administered by the Coachella Valley Conservation Commission ("CVCC"), a joint powers authority comprised of elected officials and dedicated to the purchase and management of conservation land in the Coachella Valley. *See* Coachella Valley MSCHP Home Page, http://www/cvmshcp.org (last visited Nov. 16, 2010). Most of CVEP's government partners are involved

with the CVCC. The purpose of the MSCHP is to facilitate management and monitoring of conserved lands, simplify compliance with environmental laws, and balance environmental concerns with responsible new development. The MSCHP identified for protection more than 745,900 acres of habitat across 21 conservation areas. It identified 27 separate species of plants and wildlife for which to provide protected habitat in the near future and in perpetuity. On the identified lands, development is strictly limited to not more than 22,420 acres. The project involves acquisition of identified lands, mitigation of development impacts, and monitoring of biological characteristics and particular needs of the species and lands being preserved.

Funding for the MSCHP comes from a combination of sources, including developmental impact fees, open space trust funds, and permitting fees. As the record below reflects, and as noted in the dissent (*id.* at 1081), the Kaiser project would have generated $1 per ton of waste deposited at the landfill in support of mitigation and monitoring efforts under the MSCHP. Revenues generated by the Kaiser project would also have been used to acquire additional lands for conservation.

In "flyspecking" the BLM's decision to exchange government land, the Ninth Circuit focused on particular language in the Environmental Impact Statement prepared by the BLM rather than on the whole record, which described the overall environmental benefits the project would have provided to Riverside County and the Coachella Valley region. Those benefits were clear to the BLM, as articulated in the lengthy Record of Decision, and

the Ninth Circuit should not have blithely substituted its own judgment in place of the BLM's extensive administrative process, which took into account local needs and concerns.

II. The Decision Below Will Hinder Future Development Efforts And Encourage Obstructionist Litigation

Because the Ninth Circuit discounted the BLM's extensive administrative process in this case in favor of its own interpretation of narrow portions of the Record of Decision, its published opinion effectively declares open season on developers, even those working within the confines of the strict environmental laws in California.

Kaiser first proposed the land exchange with the BLM in 1989. It began working with the BLM and Riverside County in the early 1990s to conduct extensive environmental review as required by the California Environmental Quality Act ("CEQA") and other applicable laws. This case was tied up in litigation at the state level for many years (*see Nat'l Parks & Conservation Ass'n v. County of Riverside*, 50 Cal. Rptr. 2d 339 (Cal. Ct. App. 1996), *Nat'l Parks & Conservation Ass'n v. County of Riverside*, 84 Cal. Rptr. 2d 563 (Cal. Ct. App. 1999)) and has been tied up in the federal courts for many more. Indeed the federal lawsuit, filed by the same plaintiffs who lost in state court, was filed in 1999, more than 10 years ago.

The Ninth Circuit's decision ignored the long history of the Kaiser project, and nearly 50,000 pages of record supporting the BLM's ultimate decision, in

favor of unsubstantiated claims by obstructionist plaintiffs. Local land use authorities take very seriously their statutory responsibility to work with federal and state agencies to carefully balance conservation and development goals. The seriousness of that effort is attested to by the lengthy administrative record in this case. CVEP is concerned the decision below will diminish the importance of local input and transfer to the courts the decision-making authority entrusted to local, state, and federal agencies entrusted with protecting our region's natural endowment.

CVEP is also concerned the decision below will discourage development of any kind, even environmentally responsible development essential to regional economic vitality. If the Kaiser project, which would have positively impacted the Coachella Valley region and its conservation efforts, was "flyspecked" to death how can one expect any future project will fare better? Even the most environmentally conscious developers will not be able to accomplish what Judge Trott, in his dissent, described as a "Sisyphean task"—eliminating, to the satisfaction of a reviewing court, every technical error, even those that have no effect on the reviewing agency's substantive decision.

In its published decision the Ninth Circuit has set a precedent that enables obstructionist litigants to halt development by alleging insignificant errors resulting from "flyspecking" an agency's analysis. There are several current projects in the vicinity of the Kaiser project that could be derailed by that kind of "flyspecking."

Specifically, the projects in question are large-scale solar projects, many of which are cited on BLM land in eastern Riverside County, and almost all of which would be open to the same kinds of challenges raised in this case. CVEP's 2009 Blueprint for Economic Development (*see* CVEP Blueprint Home Page, http://www.cvepblueprint.com/ (last visited Nov. 16, 2010)) targets clean technology and energy-generation as a priority for local investment. Clean technology has become a significant factor in the regional economy, with a series of large-scale solar projects being proposed in Riverside County. Projects in eastern Riverside County have already been approved by the California Energy Commission, working together with the BLM: Solar Millennium Blythe, with nominal generation capacity of 1,000-megawatts (Cal. Energy Comm'n, Solar Millennium Blythe Solar Power Project, http://www.energy.ca.gov/sitingcases/solar_millennium_ blythe/index.html (last visited Nov. 16, 2010)), and Genesis Solar, a 250-megawatt generation facility, also near Blythe (Cal. Energy Comm'n, Genesis Solar Project, http://www.energy.ca.gov/sitingcases/genesis_solar/index.html (last visited Nov. 16, 2010)). Other projects have been proposed and are awaiting approval, including Desert Sunlight Solar Farm, solar generation plant, with a nominal capacity of 550-megawatts, located just six miles from Desert Center, the area near the Kaiser project (U.S. Dep't of Interior, Desert Sunlight Solar Farm http://www.blm.gov/ca/st/en/fo/palmsprings/Solar_Projects/Desert_Sunlight.html (last visited Nov. 16, 2010), Palen Solar, with a nominal generation capacity of 500-megawatts, located ten miles from Desert Center (Cal. Energy Comm', Solar Millenium Palen,

http://www.energy.ca.gov/sitingcases/solar_millenniu m_palen/index.html (last visited Nov. 16, 2010)), and Rice Solar Energy Project, with nominal 150-megawatt capacity (Cal. Energy Comm'n, Rice Solar Energy Project—Power Plant Licensing Case, http://www.energy.ca.gov/sitingcases/ricesolar/index. html (last visited Nov. 16, 2010).

These projects cover thousands of acres, entail investment of billions of dollars, and are in the vicinity of the Kaiser project. Like Kaiser's project, these new solar projects will be subject to administrative review by the BLM and other agencies. If "flyspecking" triumphs over a holistic review of agency decision-making, many of these projects, which could provide thousands of jobs and needed revenue in the region, will be derailed.

CONCLUSION

The Petitioners raise an issue of great importance. The Kaiser project would have resulted in a net benefit for the Coachella Valley's regional environmental conservation efforts, and it was approved by the BLM and County of Riverside after a very lengthy administrative process. The results of that process should have provided certainty to Kaiser and regional players that the project would be permitted to move forward. But, the Ninth Circuit's position undermines the ability of agencies to make development decisions that stick. Many regional governments and actors had input into the BLM review process that resulted in approval of the Kasier land exchange. Now, as the result of technical errors that have no bearing on the BLM's substantive

decision, the results of the entire review process have been discredited and tossed aside. The Ninth Circuit's decision will significantly impact the Coachella Valley region. It will slow the CVCC's ability to complete the MSCHP, and will frighten future developers from pursuing projects in the area. For all of those reasons, the Court should grant Kaiser's petition for a writ of certiorari.

Respectfully submitted,

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